

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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| In the Matter of                                 | ) |                      |
|  | ) |                      |
| Lifeline and Link Up Reform and                  | ) | WC Docket No. 11-42  |
| Modernization                                    | ) |                      |
|  | ) |                      |
| Lifeline and Link Up                             | ) | WC Docket No. 03-109 |
|  | ) |                      |
| Federal-State Joint Board on Universal Service   | ) | CC Docket No. 96-45  |
|  | ) |                      |
| Advancing Broadband Availability Through Digital | ) | WC Docket No. 12-23  |
| Literacy Training                                | ) |                      |
|  | ) |                      |

**REPLY COMMENTS OF THE**

**SCHOOLS, HEALTH AND LIBRARIES BROADBAND (SHLB) COALITION**

**I. INTRODUCTION**

The Schools, Health and Libraries Broadband Coalition (“SHLB Coalition”)<sup>1</sup> respectfully submits these reply comments in response to the Federal Communications Commission’s (FCC or Commission) recent Further Notice of Proposed Rulemaking (FNPRM) regarding funding for digital literacy training.<sup>2</sup>

The SHLB Coalition<sup>3</sup> endorses the comments of many other parties in this proceeding that describe the importance of digital literacy training to support broadband adoption. The SHLB Coalition supports the FCC’s proposal to allocate \$50 Million for each of four years from Lifeline reform savings for libraries, schools, and other community anchor institutions to engage in digital literacy training.

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<sup>1</sup> The SHLB Coalition is a broad-based coalition consisting of representatives of schools, health care providers, libraries, private sector companies, for-profit and not-for-profit broadband providers, state and national research and education (R&E) networks, municipalities, philanthropic foundations, consumer organizations and others. All members of the SHLB Coalition share the common goal of bringing open, affordable, high-capacity broadband to community anchor institutions and their communities across the United States. See, [www.shlb.org](http://www.shlb.org) for a current list of SHLB members.

<sup>2</sup> See, Report and Order and Further Notice of Proposed Rulemaking (“FNPRM”), FCC 12-11, released February 6, 2012.

<sup>3</sup> “SHLB Coalition” is pronounced “shell-bee Coalition.”

The SHLB Coalition notes that several commenters opposed the idea that existing digital literacy training programs should be ineligible for digital literacy funding.<sup>4</sup> Many of the best and most accomplished digital literacy training projects need additional resources. For instance, the funding for recipients of Public Computer Center (PCC) and Sustainable Broadband Adoption (SBA) projects under the BTOP program will expire in 2013. Providing funding to established and successful programs is more likely to advance broadband adoption than start-up programs that have not demonstrated a track record of success. Funding a wide range of entities to provide digital literacy training ensures that Commission-led digital training efforts best meet the needs of local communities. Schools, libraries, community centers, public media, housing projects and other organizations that house resources for low-income communities may be particularly well-suited to deliver digital literacy training to community members.

## **II. The Commission Should Consider Authorizing Digital Literacy Funding from the Lifeline Program Using its Ancillary Authority Under Title I.**

The SHLB Coalition focuses the majority of these reply comments on the legal authority for providing funding from the Universal Service Fund (USF) for digital literacy training. In paragraphs 422-425 of the FNPRM, the FCC asked commenters to address several different questions concerning its legal authority to fund digital literacy training through the USF. In particular, the Commission asked whether it has the legal authority to award funding for digital literacy training through the Lifeline program or the E-rate program. However most of the FNPRM discussion suggests using the E-rate program and basing its authority Title II (Section 254 in particular). The SHLB Coalition offers a different view on each of these issues.

### **1. The FCC Does Not Have Authority to Use the E-rate Program as the Conduit for Funding Digital Literacy Training.**

As several others, including ALA, EdLiNC, and AT&T explained in their initial comments, there is a legal barrier to awarding funding for digital literacy training through the E-rate program. The E-rate program was created by statute specifically to serve the connectivity needs of schools and libraries. The E-rate program covers transmission services – telecommunications services, internal connections and Internet access. The statutory language does not permit the Commission to fund content, training, curriculum development, software, marketing and the other components of digital literacy training identified in paragraph 436 of the FNPRM. The “special services” provision in section 254(c)(3) does not provide the Commission with the flexibility to fund content development and training. Subsection 254(c)(3) only authorizes special services “for the purposes of subsection (h),” which refers to telecommunications and access to advanced information services – transmission services.

The statutory limitations of the E-rate program are quite apparent in the *TOPUC* decision of the Fifth Circuit Court of Appeals.<sup>5</sup> That decision barely upheld the FCC’s use of the E-rate program to fund internal connections and Internet access. Expanding the E-rate program to cover training and

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<sup>4</sup> See initial comments of the American Library Association (ALA), the New America Foundation and Access Humboldt, among others.

<sup>5</sup> *Texas Office of Public Utility Counsel v. FCC (“TOPUC”)*, 183 F.3d 393 (5th Cir. 1999).

curriculum development would be even more vulnerable on appeal; if the Commission attempts to use the E-rate program to fund digital literacy and that decision is challenged and overturned on appeal, the Commission's goal of enhancing broadband adoption through digital literacy training would be undermined.

Furthermore, using the E-rate program to fund digital literacy training could open the door to additional projects that could drain the E-rate program of scarce funding. The E-rate program is already significantly underfunded, and using the program for additional activities such as digital literacy training could make it that much more difficult for the E-rate program to meet its current objectives of supporting telecommunications, internal connections and access to the Internet.

## **2. The FCC Should Fund Digital Literacy Training Directly from Savings from Lifeline Reforms.**

Rather than using the E-rate program, the SHLB Coalition agrees with both suggestions to fund the program with proposed Lifeline savings and to fund the program through the Lifeline Fund. The Lifeline program is intended to assist low-income persons, and many of the people who are most in need of digital literacy training are low-income. In its report, "Opportunity for All", the Gates Foundation found that

Income is a major driver for uses of public library Internet access. People earning between 100 and 200 percent of the poverty guidelines, or about \$22,000 to \$44,000 for a family of four, had higher odds of using library computers or wireless connections by a factor of 2.68 than people earning more than 300 percent of the poverty guidelines. This is consistent with the lower availability of alternative means for Internet access also reported by lower income earners.<sup>6</sup>

## **3. Using its Title I Authority to Fund Digital Literacy Training Will Give the Commission Greater Flexibility to Accomplish its Broadband Adoption goals.**

The FNPRM constrained its discussion of the Commission's legal authority to the provisions of section 254. The SHLB Coalition respectfully suggests that the FCC consider instead using its "ancillary authority" under Title I as the legal basis for awarding USF funding for digital literacy, as it did when it first created the Lifeline program.

The Lifeline program was created in 1985, prior to the enactment of the Telecommunications Act of 1996 and section 254. When the Commission first established the Lifeline program, it based its authority on two provisions of Title I (sections 1, and 4(i)), and two provisions of Title II (sections 201 and 205).<sup>7</sup>

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<sup>6</sup> See, Becker, Samantha, Michael D. Crandall, Karen E. Fisher, Bo Kinney, Carol Landry, and Anita Rocha. (March, 2010). *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries*. (IMLS-2010-RES-01). Institute of Museum and Library Services. Washington, D.C. , available at <http://www.gatesfoundation.org/learning/Pages/us-libraries-report-opportunity-for-all.aspx>, p. 33.

<sup>7</sup> "Our authority to restrict, expand, or otherwise modify the Lifeline program through provisions other than section 254 has been well established over the past decade. In 1985, we created Lifeline under the general

The passage of the Telecommunications Act, and the codification of section 254, did not overturn or usurp the FCC's authority to create and administer the Lifeline program. In fact, section 254(j) explicitly preserves the FCC's Lifeline program in a "savings clause":<sup>8</sup>

(j) LIFELINE ASSISTANCE.--Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

This "savings clause" preserves the Commission's Title I authority to implement the Lifeline program. The SHLB Coalition suggests that the FCC consider using the same authority that it used to create the Lifeline program in the 1980's as the authority for awarding digital literacy funding today. Using its Title I authority – also called its "ancillary authority" – will give the Commission significantly more flexibility to design the program to meet its objectives of promoting broadband adoption.

The *Comcast* decision<sup>9</sup> did not eliminate the FCC's authority to use Title I as the basis for funding digital literacy through the Lifeline program. In fact, the *Comcast* decision allows the FCC to use Title I as long as the policy is tied to a specific statutory grant of authority.

In that case, the D.C. Circuit Court of Appeal considered whether or not the FCC had the legal authority under Title I to impose a fine on Comcast for violating its so-called "net neutrality" principles.<sup>10</sup> The court found that

The Commission may exercise this "ancillary" authority only if it demonstrates that its action—here barring Comcast from interfering with its customers' use of peer-to-peer networking applications—is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

The court found that the Commission could not rely on statements of policy, and the Commission's decision must be "'really incidental to, and contingent upon, *specifically delegated powers under the Act.*" *Id.* at 612 (emphasis added).'" (quoting *NARUC II*, 533 F.2d at 612) The court decided that the FCC had not based its exercise of jurisdiction over Comcast's network management practices on any specific statutory grant of authority:

On the record before us, we see "no relationship whatever," *NARUC II*, 533 F.2d at 616, between the *Order* and services subject to Commission regulation. Perhaps the Commission could use section 230(b) or section 1 to demonstrate such a connection, but that is not how it employs them here. Instead, the Commission maintains that congressional policy by itself creates "statutorily mandated

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authority of sections 1, 4(i), 201, and 205 of the Act. Since then, we have relied on those provisions to modify the program on several occasions." 1997 USF Order, para. 337.

<sup>8</sup> While Section 254(j) preserved the Lifeline program, it does not set it in stone. The FCC has previously ruled that it retains the authority to make changes to the Lifeline program, and it has, in fact, done so several times, including in the Feb. 6, 2012 Report and Order accompanying the FNPRM.

<sup>9</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>10</sup> The SHLB Coalition has no position on the "net neutrality" issue.

responsibilities” sufficient to support the exercise of section 4(i) ancillary authority. Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether.

Clearly, the court was unsatisfied that the FCC had tied its authority over broadband services to a specific statutory grant of authority. But, at the same time, the court did not eliminate the FCC’s “ancillary authority”. Indeed, it could not do so, because the Commission’s ancillary authority has been upheld on at least two occasions by the Supreme Court (upholding the Commission’s regulation of cable television services as “ancillary” to its statutory authority over broadcasting).<sup>11</sup> Rather, the court said that the FCC could not rely on statements of Congressional policy as a grant of authority and instead found that exercise of the FCC’s ancillary authority is limited and must be tied to direct statutory mandates.

The SHLB Coalition submits that the FCC can make the “link” required by the court between funding for digital literacy under Title I and several “statutorily mandated responsibilities” under Title II. Just as the court allowed the FCC to regulate cable television as “ancillary” to its direct statutory authority over broadcasting (under Title III), the FCC can assert “ancillary” authority over digital literacy for broadband adoption by linking this action to its specific statutory responsibilities over telecommunications services (under Title II) in at least two ways:

- a. The FCC has a direct statutory responsibility to ensure that charges and practices of common carriers are “just and reasonable” under section 201(b).<sup>12</sup> Broadband services have a significant impact on whether these rates are just and reasonable. For instance, broadband services allow the carriage of voice over IP (VoIP), which is an increasing competitor to basic telephone voice services. Competition from VoIP may create market pressures on traditional telecommunications carriers to reduce their telephone rates in some areas; in non-competitive areas, however, there will be pressure to increase telephone rates to make up for the revenue decline in the areas where broadband/VoIP has forced prices down. Furthermore, common carriers may build networks that carry both telecommunications services and broadband services. The costs of deploying joint telecommunications/broadband network plant may have a significant impact on telecommunications charges and may put pressure on telecommunications charges to go up or down, depending on the circumstances. Thus the Commission must have authority over broadband services in order to ensure that its direct statutory responsibility to supervise broadband practices and adoption to ensure that it can fulfill its mandated statutory responsibility to ensure that common carrier rates are just and reasonable.<sup>13</sup>

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<sup>11</sup> See, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*),

<sup>12</sup> While the *Comcast* court briefly discussed a version of this section 201(b) argument, it dismissed this argument (not on its merits) because it ruled that the FCC had forfeited this argument by not raising it in its appeal.

<sup>13</sup> In case there is any doubt that the Commission has direct statutory authority over the charges and practices of common carriers, the last sentence of Section 201(b) states, “The Commissioner [sic] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”

Funding for digital literacy affects the growth of broadband services and the charges for common carrier services under section 201(b). The goal of digital literacy funding is to increase broadband adoption. Increasing the number of broadband subscribers will have an impact on the deployment of joint telecommunications/broadband networks and the charges for telecommunications services, which in turn will affect the charges and practices of common carriers who often deploy such networks.

- b. There is no question that the Commission has a mandatory statutory responsibility to preserve and advance universal service. Section 254(a)(2) directs the Commission to implement rules to govern universal service funding, and section 254(c)(1) requires the Commission to “establish” a definition of universal service that takes “into account advances in telecommunications and information technologies and services.”

Funding for digital literacy is directly related to these statutory objectives. Broadband subscribers have a direct connection to the Internet, the world wide web, to telemedicine and distance education, and many other “information technologies and services.” By and large, consumers cannot access these services via a dial-up connection because the bandwidth of a dial-up connection is so limited. At a practical level, the only way consumers can access advanced information services is via a broadband connection. Thus, funding for digital literacy training will promote the FCC’s statutorily mandated responsibilities to preserve *and advance* universal service.

Thus, even though digital literacy training may not be a service that is regulated under Title II, funding digital literacy training is critically important for the Commission to carry out its statutory responsibilities to ensure telecommunications rates are “just and reasonable” under section 201 and to implement the universal service provisions of section 254.<sup>14</sup>

There are several advantages to providing funding for digital literacy under the FCC’s Title I “ancillary authority.” While the Commission’s ancillary authority is not unlimited, the Commission does have significantly more flexibility to decide upon the rules for awarding funding under Title I. For instance:

- By authorizing digital literacy funding under Title I, the Commission is not obligated to award funding to eligible telecommunications carriers, as is suggested by section 254(e). Instead, the Commission has the flexibility to award funding to entities (such as libraries, schools, community media and other community anchor institutions) that are, in its view, best situated to accomplish the statutory purposes.

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<sup>14</sup> The Comcast court expressed concern that, if it approved the broad interpretation of “ancillary authority” articulated by the Commission, the Commission might assert authority to regulate broadband prices and that the Commission’s authority would be effectively unlimited. It is important to note that the SHLB Coalition is not proposing unlimited Title I authority. For instance, neither of the arguments in a. and b. necessarily give the FCC the authority to regulate prices for broadband services.

- Similarly, the Commission is not obligated to award the funding solely to libraries and schools, the entities identified in section 254(h)(1)(B). Libraries have demonstrated a commitment to digital literacy training – both by implementing digital literacy programs on their own and by applying for and receiving BTOP/PCC grants. But several other organizations (such as community centers, community media providers, low-income housing projects, etc.) have also been involved in providing digital literacy training services for their communities and should be eligible to receive such funding. The FCC has the flexibility under Title I to award funding directly to any entity that will best encourage broadband adoption through digital literacy training.

### **III. Conclusion**

Like many of the commenters in this proceeding, the SHLB Coalition respectfully questions the Commission's legal authority to use the E-rate program as the conduit for funding digital literacy training. The SHLB Coalition suggests that digital literacy training should instead be funded directly from the Lifeline program to libraries, schools, community media centers, and other community anchor institutions that provide digital literacy training. The SHLB Coalition also recommends that the FCC base its authority for digital literacy training on its "ancillary authority" under Title I of the Communications Act, as this will give the Commission the greatest flexibility to accomplish its goal of improving broadband adoption.

Respectfully Submitted,

A handwritten signature in black ink that reads "John Windhausen, Jr." with a stylized flourish at the end.

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